COLT

COALITION OF LARGE TRIBES

Mandan, Hidatsa And Arikara Nations / Oglala Sioux Tribe / Crow Tribe / Navajo Nation / Sisseton Wahpeton Sioux Tribe / Blackfeet Tribe Of Montana / Rosebud Sioux Tribe / Spokane **Tribe / Cheyenne River Sioux Tribe**

TESTIMONY TO THE U.S. SENATE COMMITTEE ON INDIAN AFFAIRS
"The American Indian Probate Reform Act: Empowering Indian Land Owners"
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Coalition of Large Tribes (COLT)

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Introduction and Background.

Good afternoon Chairman Akaka, Vice Chairman Barrasso, and members of the U.S. Senate Committee on Indian Affairs. My name is Majel M. Russell. I am an enrolled member of the Crow Tribe in Montana, an individual Indian trust landowner and practice federal Indian law out of Montana. I currently serve as legal counsel for the Coalition of Large Tribes ("COLT"). I would like to thank you for holding this hearing and for the opportunity to testify today on behalf of COLT.

COLT was formally established in early April 2011, and is comprised of 11 large land based tribes, including the Mandan, Hidatsa and Arikara Nations, the Oglala Sioux Tribe, the Crow Tribe, the Navajo Nation, the Sisseton Wahpeton Sioux Tribe, the Blackfeet Tribe of Montana, the Rosebud Sioux Tribe and the Cheyenne River Sioux Tribe. COLT is co-chaired by Chairmen Tex Hall of the MHA Nation and Cedric Black Eagle of the Crow Tribe.

COLT was organized to provide a unified advocacy base for Tribes that govern large trust landbases and that strive to insure the most beneficial use of those lands for tribes and individual Indian landowners. A component of COLT's mission has been to identify statutory, regulatory, fiscal and policy barriers to tribal energy development and to make recommendations to eliminate or lessen their impacts. Additionally, COLT has galvanized efforts to restore and protect tribal landbases.

Consistent with the above concerns, COLT has identified provisions in the American Indian Probate Reform Act of 2004 that could be improved to better comply with the Congressional intent of AIPRA to reduce fractionation and enhance beneficial use of Indian trust lands. Thus, I will be discussing several important topics in this regard: 1) amending the valuation or appraisal process of trust lands for lifetime sales between Indian tribes and individual Indians, including mineral interests and improvements on trust lands; 2) clarification of existing authority for the

acquisition of undivided fee interests into trust; 3) improving opportunities for tribes and individuals to purchase lands at probate; 4) mandating adequate notice, education and assistance for tribes and individuals of their rights to participate in consolidation agreements at probate;5) mandating enhanced estate planning efforts for individual Indian landowners; and 6) review of the life estate and single heir rule provisons.

The American Indian Probate Reform Act of 2004

The American Indian Probate Reform Act of 2004 ("AIPRA"), 25 U.S.C. §§ 2201-2221, amended the Indian Land Consolidation Act ("ILCA") with the principal purpose of addressing "the ever-worsening administrative and economic problems associated with the phenomenon of fractionated ownership of Indian lands." Sen. Rpt. 108-264 (May 13, 2004). Thus, ILCA was amended to create a federal probate code and to improve mechanisms by which Indian tribes and individuals owners of trust or restricted land can consolidate fractionated parcels of land.

Valuation of Trust Lands

One of the provisions in the American Indian Probate Reform Act of 2004 that was carried over from the 2000 Amendments to the ILCA is Section 2216- sales, gifts and exchanges between Indians and Indian tribes. Under this Section, tribes can purchase fractionated interests that are greater than 5% of the total tract for *less than fair market value* so long as the Indian owner is provided an "*estimate of value."* The purpose of this section is to encourage consolidation of land ownership through transactions involving individual Indians and between Indians and Indian tribes exercising jurisdiction over the land. Several aspects of Section 2216(b) deserve attention with respect to tribal purchase of these fractionated interests.

First, while AIPRA provides tribes authority to purchase fractionated interests from individual Indian landowners, no accompanying regulations have been promulgated to implement this section. Current regulations, adopted pre-AIPRA provide that "except as otherwise provided by the Secretary," an appraisal is required before approving a sale (or exchange or other transfer). 25 C.F.R. § 152.24. As stated earlier, under AIPRA, Section 2216(b) requires only an estimate of value. While there is case law that says the "estimate of value" requirement overrides the more stringent regulation in the C.F.R. requiring an appraisal, the regulations have not been revised to remove this discrepancy between the regulations and the law, resulting in confusion for tribes, landowners and the Bureau of Indian Affairs (BIA). (See *Bernard v. Acting Great Plains Reg. Dir*., 46 IBIA 28, 41-42, citing *Miller v. Rocky Mtn. Reg. Dir*., 25 IBIA 187, 191 (1994) holding that the statute controls when there is a discrepancy between a BIA regulation and a later-enacted statute).

While it may be clear that something less than an appraisal is required for conveyances under Section 2216 (b), Tribes do not have guidance as to what will meet the definition of an "estimate of value" given the lack of statutory guidance addressing this issue.

An additional issue under 2216(b) is the valuation of fractionated mineral interests, even if something less than an appraisal is required. Valuation of mineral interests is especially problematic for a parcel that has no production history. Obtaining a pre-sale estimate of value

for these interests would be extremely cumbersome, if not impossible. While it is true that an individual Indian can waive the estimate of value requirement where the ownership interest is less than 5% of the parcel, individual Indians do not have the option to waive the estimate of value requirement for sales of interests representing greater than 5%.

Additionally, while a waiver for the estimate of value is available for interests representing less than 5%, this exception is only available where the grantor is conveying to a spouse, brother, sister, lineal ancestor, lineal descendant, collateral heir, co-owner or tribe. Thus, this exception does not include Indians and non-member Indians who are not co-owners. Limiting the waiver exception to interests representing less than 5% and to the category of individuals described above frustrates tribes' and individual Indians' ability to quickly and easily enter into exchanges and sales that would accomplish consolidation.

Section 2216 could be amended to provide tribes with authority to enact their own regulations governing valuation requirements of transactions that come under 2216(b). Such a provision would be similar to Section 2205 of AIPRA, providing Tribes with authority to enact their own probate codes, subject to Secretarial approval. This delegated authority could include threshold requirements, such as the five year prohibition on the Secretary to approve a transaction that would put the land into fee status (§ 2216(b)(2)) as well as certain valuation standards. Tribes should have the option of contracting for pre-sale and post-sale valuation of tracts without the current burdensome step of federal approval, similar to the regulations implementing Section 2205 of AIPRA, which allow tribes to contract for preparation of probate packages.

The intent of Section 2216 was to relax the requirements of inter vivos conveyances of trust real property to promote consolidation. Eliminating the requirement for a formal appraisal in lieu of 'an estimate of value' is a step in the right direction. However, amending Section 2216 to allow individual Indians to waive the estimate of value should be extended to all fractionated interests, rather than limiting this exception to highly fractionated, or less than 5%, interests. The option to waive the estimate of value should also be extended to transactions wherein the grantee is a member or non-member Indian, regardless of whether he or she is related to the grantor. Allowing tribes to determine how best to effectuate conveyances with their members would acknowledge tribal self-determination and allow tribes to develop procedures based on a tribe's unique landbase, history, resources, and member ownership in order to effectively address fractionation. Frankly, allowing Indian landowners the ability of private fee landowners to negotiate sales and exchanges would recognize land owner rights and facilitate active land ownership.

Acquisition of Undivided Fee Interests into Trust Status

25 U.S.C. § 2216 (c) mandates that upon a request from an individual Indian or Tribe to take an undivided fee interest into trust that the Secretary shall do so 'forthwith'. The clear intent of this provision is to consolidate a tract of land that is comprised of undivided trust and fee interests into sole management as a trust tract. The provision was adopted into law in 2000, over 11 years ago. However, no regulations have been promulgated to provide guidance to the Department, and as a result, the Department has not yet determined that requests to acquire undivided fee interests are mandatory acquisitions. A simple revision to 2216 (c) that clarifies that a tribal or individual Indian landowner's request for the United States to acquire an undivided fee interest is

a mandatory acquisition would insure that the original intent of Congress is effectuated. Without a statutory clarification, the Department has reviewed undivided fee interest acquisition requests in accordance with its discretionary acquisition authority under the IRA which undermines this valuable consolidation provision.

Purchase at probate-25 U.S.C. § 2206(o)

The AIPRA purchase at probate provision at 25 U.S.C. § 2206(o) is another valuable land consolidation tool. Like life time conveyances under Section 2216, purchase at probate allows individual Indians and tribes the opportunity to consolidate fractionated interests in trust or restricted land at probate; however, the appraisal process also hinders this option. Additionally, a concern exists that tribes and individual Indians do not receive adequate notice of their rights to purchase at probate under this section.

This provision allows "eligible purchasers," meaning tribes, devisees and eligible heirs to purchase trust or restricted interests in a decedent's estate for no less than fair market value, subject to certain consent requirements. An heir or devisee qualifies as an eligible purchaser if the individual is taking an interest in the same parcel of land in the probate proceeding (See 43 C.F.R. § 30.161). The regulations implementing Section 2206(o) require an eligible purchaser to provide written notice to the Office of Hearings and Appeals (OHA), the federal agency responsible for adjudicating Indian probates, of his or her desire to purchase an interest.

Upon receiving notice from an eligible purchaser, the OHA requests an appraisal, in accordance with the Uniform Standards for Professional Appraisal (USPAP) to establish "appraised market value" of the interest. Upon receiving the appraisal, OHA sends notice of the sale to all eligible purchasers, the BIA, all of the heirs, devisees and the Indian tribe with jurisdiction over the land. Although an appraised market value can be based "on a valuation method developed by the Secretary under 2214 of the AIPRA," OHA will often not approve a purchase without the USPAP appraisal. OHA will then approve a purchase at probate if an eligible purchaser submits a bid in an amount greater than or equal to the "market value" of the interest. Obviously, with delay in obtaining USPAP appraisals, this purchase option is undermined especially when OHA has strict deadlines to close probates.

To improve the purchase at probate, Section 2206(o) should be revised to mandate notice to landowners, and to relax the requirements for purchases. First, either the BIA or the OHA should be mandated to provide the tribe, heirs and devisees with meaningful notice of their right to purchase under this Section. Providing landowners with notice early on in the probate proceedings is critical since a written request to purchase interests at probate must be accomplished prior to a final decision being rendered. One option is to have the BIA agency that is responsible for preparing the decedent's probate file include a notice and explanation of rights under Section 2206(o) as part of the probate file. This probate file is sent to the OHA upon completion. Accordingly, OHA could include the notice and explanation of rights to tribes, heirs and devisees at the time interested parties are served with notice of a probate hearing (See 43 C.F.R. § 30.114).

In addition to putting landowners on notice of their rights to purchase at probate, Section 2206(o) should be amended to include a waiver for obtaining an "appraised market value" and for

purchasing interests at less than fair market value to achieve consistency with Section 2216. Further, allowing an "estimate of value" would avoid the time consuming and expensive USPAP appraisals for mineral interests that are included in parcels of land with no production history. Presently, mineral appraisals are often not completed for purchases at probate; and unless they comply with USPAP standards, purchase requests are being denied or prolonged. Our experience is that some confusion exists as to which federal agency is responsible for requesting and obtaining a mineral interest appraisal.

Further, clarification of the tribal consent requirement for purchases at probate is long overdue. Where the decedent leaves no spouse and children, the less than 5% tracts go to the Tribe. Tribes therefore need to provide consent for a sibling to purchase interests that would otherwise go to the Tribe; however, Tribes have not been actively responding to these requests. First of all, it is not clear who is responsible for contacting the tribes, and second, there is no guidance to obtain consent. An option to consider would be for OHA to send notice to the tribe of an heir's request to purchase. If the tribe fails to raise an objection within a certain time period, the probate judge could then approve the sale. This notice could also provide the tribes with an explanation of its right to renounce its inherited interests and the timeframes to do so.

Consolidation Agreements at Probate-25 U.S.C. § 2206(j)(9)

Like purchase at probate and lifetime conveyances, consolidation agreements at probate provide additional authority for tribes and individual Indians to reduce fractionated ownership of Indian trust and restricted land. Section 2206(j)(9) of the AIPRA allows heirs and devisees to consolidate interests in any tract of land in the decedent's inventory, and also allows heirs and devisees to gift or exchange their own land as part of the final consolidation agreement. Currently, there are no regulations implementing this section.

In 2009 and 2010, Elk River Law Office in conjunction with the Bureau of Indian Affairs and Inter Tribal Monitoring Association conducted an estate planning pilot project, which in part, included assisting families with consolidation agreements at probate. Recognizing that fractionated ownership of land reduced the ability of Tribes and individual Indians to effectively manage the land, one goal of the project was to determine whether consolidation agreements at probate were a viable tool for reducing fractionation.

The Pilot Project statistics clearly indicate that consolidation agreements at probate could play a key role in reducing and even reversing fractionated ownership of Indian land. Consider the following statistics to determine how successful these agreements were in reducing fractionation. Absent the 27 consolidation agreements that were executed, 3,246 undivided interests would have been created; that is, 3,246 undivided interests would have been created by operation of AIPRA's intestacy rules and as a result of will devises. However, only 937 new interests were created from 27 consolidation agreements. This means that a total of 2,309 new undivided interests were *avoided* as a result of 27 consolidation agreements. (See Supplemental Report Estate Planning Pilot Project: Consolidation Agreements at Probate for Individual Indian Trust landowners in an effort to Reduce Fractionated Land Ownership in Indian Country, July 2010).

While the role of consolidation agreements in reducing fractionation is clear based on project statistics, it is equally clear that additional outreach and resources would assist and increase

landowner participation in consolidation agreements. There are no provisions within Section 2206(j)(9) that require the BIA or the OHA to provide notice to tribes, heirs and devisees of their right to participate in consolidation agreements at probate. Our experience in the Pilot Project showed an overwhelming willingness on the part of families to participate in a mediation for the purpose of entering into a consolidation agreement. However, had they not been advised of how a consolidation agreement could benefit them as landowners, it is unlikely they would have considered or even been aware of this option.

Thus, an amendment to 2006(j)(9) that requires notice to tribes and individual Indians of their right to participate in consolidation agreements would enhance the use of this valuable consolidation tool. In addition, Section 2206(o) could be amended to include a provision allowing families to participate in attorney-assisted mediations. Given the high percentage of families in the pilot project who were successful in entering into consolidation agreements, noticing families of their rights early on and providing mediation services would eliminate a large portion the Department expenditures on probates, expedite OHA's ability to close estates in a timely manner, and reduce litigation—all while preventing and reducing fractionation.

Permanent Improvements

While a notice and explanation of rights to landowners is the key to increasing participation in consolidation agreements, further clarification of the process to identify and value permanent improvements on trust lands would reduce current confusion. In order to approve a consolidation agreement, a judge has to find that the participants were advised of "all material facts." One concern when assisting families who know very little about the trust property is whether a family can truly be advised of "all material facts" when it is unknown whether the tracts include permanent improvements, and if so, the value of those improvements.

Current regulations provide that a probate file (prepared by the BIA agency that serves the tribe where the decedent was an enrolled member) must include a certified inventory of trust land including "accurate and adequate descriptions of all land and appurtenances." 25 C.F.R. § 15.202. However, local agencies have often not complied with this provision. Nonetheless, for an heir to truly be advised of all material facts, the value of permanent improvements is critical. Not only could permanent improvements affect a family's deliberations in the simplest of consolidation agreements, access to this information could become even more critical in cases where families are opting to partition. Understanding what improvements are on the land may also affect a tribe's, devisee's or heir's decision to object to or alternatively initiate the purchase of fractionated interests at probate. In either case, to truly be advised of "all material facts," a Congressional mandate to the BIA to include appurtenances in the BIA probate file is necessary.

As part of the 2008 technical amendments, Section 2206 of the AIPRA was amended to provide that "a devise of trust or restricted interest in a parcel of land shall be presumed to include the interest of the testator in any permanent improvements attached to the land." Further, this section applies to covered permanent improvements "even though that covered permanent improvement is not held in trust," and without altering the trust status of the improvement (See 25 U.S.C. § 2206(H)(1)(B)-(C)). Based on this provision, a permanent improvement appears to run with the land. However, this appears to be inconsistent with the OHA's jurisdiction, which

is limited to probating trust or restricted land and trust personalty, and not real or personal property (other than land). (See 43 C.F.R. § 30.102). Thus, a statutory clarification of the role of permanent improvements not only in a consolidation agreement, but in any probate proceeding, is necessary. Allowing the OHA to probate covered permanent improvements would streamline and possibly eliminate the need for two probates-one in the OHA and one in the tribal court for the covered improvements.

Estate Planning

Will drafting plays an equally important role in consolidating Indian lands. However, landowners are without the technical assistance needed to draft wills that not only comply with the AIPRA's testamentary rules, but prevent fractionation. In my experience, wills drafted by individual Indians or untrained attorneys are often set aside for failing to comply with AIPRA requirements. Current AIPRA provisions to provide estate planning funding, if available, to non-profits for estate planning should be revised to mandate funding to create a professional will drafting service within the BIA. Such a service should include providing tribes, heirs and devisees with maps indicating the location of the decedent's interests, landowner income reports, indicating leases and revenue streams, land inventories, and other documents that should be considered when consolidating and making estate planning decisions. The argument that will drafting is a costly undertaking for the Department can be countered with the argument that wills can reduce fractionation, thereby reducing management costs.

In 2006, the BIA discontinued drafting and storage of wills for individual Indians. However, the BIA remains tasked with attempting to locate wills to include in the probate packages to be forwarded to OHA for decision. Requiring that the BIA resume storage of Indian wills would insure the wills are accessible for inclusion in probate packages and reduce costs of the current efforts to locate wills.

Another component of estate planning relates to the Tribal Probate Codes authorized by 25 USC 2205 that allows Tribes to develop rules of descent and distribution of Indian trust lands. Without an approved Tribal Probate Code, the AIPRA 'federal probate code' is applied to probate Indian trust lands. Since implementation of AIPRA, only one probate code has been approved by the Department of Interior despite the numerous probate codes submitted by Tribes for review and approval. Although the Department provided Federal Register guidance of acceptable Tribal probate code provisions, no explanation of the limits of tribal discretion are included. Further an outreach effort to education Tribes and provide technical assistance would result in a greater number of approved Tribal probate codes.

Life Estates Without Regard to Waste

Clearly, participation in consolidation agreements provides a significant cost savings to the Department, while reducing fractionated ownership of Indian lands. However, it is uncertain what role, if any, life estates without regard to waste play in reducing management costs for the Department, given that the consent of the life tenant and the remaindermen are required on

agricultural leases. It is also unclear what consent requirements apply to life tenants and remaindermen on mineral leases.

Under the AIPRA's non-testamentary provisions, the decedent's surviving spouse receives a life estate without regard to waste in the interests of the decedent representing 5% or more of the tract. (25 U.S.C. § 2206(a)(2)(A). A life estate provides the life tenant with beneficial use of the land for his or her lifetime, or until the life estate is terminated. This property right, allowing the life tenant to live on, use and take income, including bonuses and royalties, from the land is to the exclusion of any other persons having a present or future property interest in the same allotment. Despite this exclusive beneficial use, regulations governing agricultural leases require the consent of not only the life tenant, but also the remaindermen.

In addition, a 2010 IBIA case clarified that the consent of both the life tenant and remaindermen are also required for Crow competent agricultural leases of 5 years or more (See *Enemy Hunter v. Acting Rocky Mountain Reg. Dir*., BIA, 51 IBIA 322 (June 29, 2010). However, it is not clear under the regulations governing mineral leases whether the life tenant must obtain the consent of the remaindermen in order to execute a mineral lease. While it is our understanding that agencies are requesting the consent of all property holders prior to approving mineral leases, a clarification of the consent requirements for life tenants requesting approval of mineral leases is necessary.

Single Heir Rule

The single heir rule in AIPRA has garnered a significant amount of attention and criticism throughout Indian Country. However, the feedback from Indian families who participated in the Pilot Project provides an interesting perspective.

Section 2206(a)(2)(D) of the AIPRA governs the disposition of the decedent's interests representing less than 5% where the decedent did not leave a will. This section provides that the decedent's oldest surviving child receive all of the interests representing less than 5%. The exception is where the surviving spouse was residing on the parcel of land and receives a life estate. In that case, the oldest surviving child receives a remainder interest. 25 U.S.C. § 2206(a)(2)(D)(iii)(I). If the decedent left no surviving children, then these interests pass to the decedent's oldest surviving grandchild; and if none, to the oldest surviving great grandchild. Where the decedent had no children during his or her lifetime, then the small fractional interests pass to the Indian tribe with jurisdiction over the land.

There is no doubt that the single heir rule has had a tremendous impact on reducing fractionation for those interests less than 5% of a tract as those interests have been prevented from further fractionating. Additionally, it appears that Indian landowners have not overwhelmingly challenged the single heir rule as was perhaps anticipated. Most of the families who participated in the Pilot Project did not raise significant objections to the single heir rule after being provided an explanation of the rule's intent. This is not surprising given that the very reason families agreed to participate in mediation for consolidation purposes was consistent with the intent of the single heir rule-to prevent fractionation and consolidate Indian land. In fact, families were

committed to attempting to keep interests in a decedent's estate whole or from undergoing further fractionation.

Most often, if the single heir rule was an issue in mediation, it involved estates that included significant mineral interests located in the Bakkan formation, such as on the Blackfeet Reservation in Montana, or on the Fort Berthold Reservation in North Dakota, where oil production was already occurring. However, these objections were often addressed by executing consolidation agreements, whereby the less than 5% interests were shared among family members, with each heir receiving a single interest. Thus, the families found a solution to overcome any perceived unfairness with respect to the single heir rule, while still preventing fractionation.

In closing, AIPRA, and the preceding amendments to the Indian Land Consolidation Act provide important tools to reduce and prevent fractionation of Indian lands for Tribes and individual Indian landowners. However, many of these tools have been under-utilized due to a lack of accompanying regulations, lack of education, notice and technical assistance. Mandating resources to assist tribes and individual Indians in the utilization of existing AIPRA tools would result in long-term cost savings by reducing the daunting management responsibility for fractionated lands. Additionally, the revisions and clarifications discussed above would enhance the effectiveness of the existing provisions and enhance the intent of Congress.

Thank you and please contact me with any questions.